

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

REBECCA S. PILGRIM
Claimant

VS.

DEFENDER SERVICES, INC.
Respondent

AND

**AMERICAN CASUALTY CO. OF
READING, PENNSYLVANIA**
Insurance Carrier

Docket Nos. **1,046,038 &
1,046,039**

ORDER

Respondent and its insurance carrier (respondent) request review of the September 27, 2012, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on February 20, 2013.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for claimant. James P. Hess of Overland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained a 75% permanent functional impairment to her left leg in Docket No. 1,046,038 (date of accident: October 15, 2008). The ALJ concluded claimant's second left leg injury in Docket No. 1,046,039 (date of accident: April 2, 2009) was the natural and probable consequence of the injury in Docket No. 1,046,038.

Respondent claims the ALJ erred in determining the nature and extent of claimant's disability in Docket No. 1,046,038. Respondent argues the Board should adopt the functional impairment of Dr. Dan Gurba--37% impairment of function to the left leg.

Claimant advances the position that the ALJ correctly based the Award on the impairment rating of Dr. Daniel Zimmerman--75% to the left leg.

Apparently, neither the parties nor the ALJ placed much credence in the rating of the neutral physician, Dr. Peter Bieri, who was appointed by the ALJ. Dr. Bieri's rating was 50% to the left leg.

The sole issue raised for the Board's consideration is the nature and extent of claimant's disability in Docket No. 1,046,038.

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Respondent was under contract to provide janitorial services at the Topeka, Kansas, Goodyear manufacturing facility. Claimant began working as a janitor at the Goodyear plant on October 14, 2003.

Claimant was emptying a 55-gallon trash can on October 15, 2008, when she turned, twisted and heard her left knee pop. Claimant was initially treated at Tallgrass Immediate Care and was thereafter referred to orthopedic surgeon Dr. Michael Montgomery.

An MRI scan of the left knee conducted on December 15, 2008, revealed a torn medial meniscus and minimal reactive change. On December 29, 2008, Dr. Montgomery performed a left knee arthroscopy with partial medial meniscectomy and patellar chondral debridement. Claimant returned to light-duty work and was later released to full duty. Claimant sustained another left knee injury on April 2, 2009.

On May 21, 2009, another MRI of claimant's left knee was performed. The scan revealed medial joint space narrowing, degenerative changes affecting the posterior horn of the medial meniscus and truncation of the far lateral aspect of the body of the meniscus.

Dr. Montgomery recommended another arthroscopy for diagnostic purposes, however, claimant declined the surgery and requested a change in treating physician. Dr. Dan Gurba, also an orthopedic surgeon, was then authorized. Claimant was examined on July 6, 2009, by Dr. Gurba, who referred claimant back to Dr. Montgomery. Claimant was provided with light-duty restrictions which were accommodated by respondent.

On July 22, 2009, claimant's left knee pain increased and she requested additional treatment. Respondent refused to authorize treatment because claimant had retained an attorney. Claimant sought medical treatment on her own with Dr. Montgomery. Claimant was seen by Dr. Montgomery's assistant on July 24, 2009. The assistant placed claimant on sedentary duty for a two-week period following which claimant was to return to regular duty.

On September 25, 2009, Dr. Lowry Jones, an orthopedic surgeon who is associated with Dr. Gurba, performed an arthroscopy on claimant's left knee. Dr. Jones referred claimant back to Dr. Gurba, who performed a left total knee arthroplasty on January 19, 2011.

Claimant testified she still has problems walking and standing for any length of time. If she sits too long, she experiences left knee pain. She feels left knee pain when ascending or descending stairs, vacuuming and mopping. Claimant testified her activity level in general has decreased resulting in a 40-pound weight gain. Claimant's left knee is larger than her right knee. The total knee replacement improved her left knee to some extent. Numbness on the outside of her left knee and across the kneecap has improved.

Dr. Gurba opined claimant had a good result from her total knee arthroplasty. Based on the *AMA Guides*,¹ Dr. Gurba rated claimant's permanent functional impairment at 37% to the left leg.

Dr. Daniel Zimmerman, a board eligible internist who is certified as an independent medical examiner, examined and evaluated claimant on August 1, 2011, at the request of claimant's attorney. Dr. Zimmerman found claimant had a poor result from her total left knee replacement. Based on the *AMA Guides*, Dr. Zimmerman provided a rating of 75% permanent impairment to the left leg.

On April 25, 2012, the ALJ ordered claimant to undergo an independent medical examination by Dr. Bieri, a fellow of the American Academy of Disability Evaluating Physicians. Dr. Bieri examined claimant on July 17, 2012. Based on the *AMA Guides*, Dr. Bieri found claimant had a fair result from her knee replacement procedure and rated claimant's permanent impairment at 50% to the left leg.

Drs. Zimmerman and Gurba testified by deposition. Dr. Bieri was not deposed but his report is part of the record.²

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

² K.S.A. 44-516.

PRINCIPLES OF LAW

K.S.A. 44-501(a) states in part:

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.S.A. 44-510d(a) provides in relevant part:

If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(16) For the loss of a leg, 200 weeks.

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

ANALYSIS

The Board disagrees with the ALJ regarding the nature and extent of claimant's disability. There is no dispute claimant sustained a scheduled injury and the permanent partial disability (PPD) to which claimant is entitled is accordingly governed by K.S.A. 44-510d.

The medical opinions regarding claimant's outcome from the total left knee arthroplasty differ significantly, ranging from poor, to fair, to good. It is therefore not surprising that the impairment ratings are likewise substantially at variance: Dr. Zimmerman's 75%; Dr. Gurba's 37%; and Dr. Bieri's 50%. The ALJ suggests Dr.

Zimmerman's rating opinion is more persuasive than those of Drs. Gurba and Bieri. The preponderance of the evidence does not support that conclusion.

There were no objections to the qualifications of any of the three rating doctors. All three stated their ratings were based on the *AMA Guides*. There is no evidence establishing any of the medical experts violated or ignored the *AMA Guides* in reaching their impairment ratings.

The Board is persuaded that, under the circumstances of this claim, claimant's PPD should be based on Dr. Bieri's 50% left leg rating.

CONCLUSIONS OF LAW

The Award is modified to provide PPD to claimant based on a 50% permanent partial impairment of function to the left leg.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD IN DOCKET NO. 1,046,038

WHEREFORE, it is the Board's decision that the Award of ALJ Brad E. Avery dated September 27, 2012, is modified as stated above. The Award is affirmed in all other respects.

Claimant is entitled to 29 weeks of temporary total disability compensation at the rate of \$354.22 per week in the amount of \$10,272.38 followed by 85.50 weeks of permanent partial disability compensation, at the rate of \$354.22 per week, in the amount of \$30,285.81 for a 50% loss of use of the left leg, making a total award of \$40,558.19, which is ordered paid in one lump sum less amounts previously paid.

AWARD IN DOCKET NO. 1,046,039

The parties raised no issues in this claim, although the application for Board review included both docket numbers.

WHEREFORE, it is the Board's finding that the Award of ALJ Brad E. Avery dated September 27, 2012, is affirmed in all respects.

³ K.S.A. 2008 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant,
janet@ksjustice.com
James P. Hess, Attorney for Respondent,
james.hess@cna.com
Brad E. Avery, ALJ